POLITICAL RISKS WITHIN THE SPHERE OF FOREIGN TRADE CONTRACTS

Moratorium as Political Risk in the Context of Export Credit Insurance

By

FERENC MÁDL

Professor of Law

I. Introduction

1. Political risk may present itself in many forms in the international economic relations. In the strictest sense of the word, literature and practice mean by political risk of the investor or seller – of a company acting on international scale – that kind of risk which proceeds from non-business failures of the investment, sale or other venture, i. e. from non-commercial circumstances. The "normal" risk is the "commercial risk". All economic organizations have to reckon with this latter, they, however, have also more means to gauge and calculate it, to avert it in the course of progress, and if it still changes for the worse, there are available the reacting forms of law, form sueing the buyer up to the different positions of bakruptcy proceedings. What is beyond the normal business risk is the non-commercial, or political risk. This is beyond the defensive chances of the investor or seller, since it originates in circumstances of *vis major* like war, revolution, civil war, nationalization, insolvency of the state of the invesment or debtor. At the same time, the companies involved are vitally concernd, as the investment will miscarry (the partner company will be destroyed, no capital can be repatriatid, the partner will be nationalized) or the seller cannot get the price of the supplied goods.

Thus, meaning by political risk the above, may I add hereto the fact of common konwledge that subject to this risk may be the companies and traders of all states which have a considerable external turnover and transact a part of this with legal entities of such countries where the above outlined political risks may become real. In some cases – mainly for the capital exporting and treading companies of developed countries – this may involve losses of many hundred millions. As it is known, this statement may relate also to Hungary.

Against the said political risks the most general defensive institution is the insurance contract which is concluded quasi behind the concrete venture (investment or purchase), for the sake of its business safety, viz. that the investor or seller may get its money even if this would not be possible because of a political circumstance – the actual injury insured against. In the international practice there have been established appropriate insurance forms against the various political risks.

2. *The present study picks out one risk manifestation, viz. the moratorium exercised in the state of the partner*, this – an occur following to the international financial difficulties of the given state.

It seems to be advisable to direct attention mainly to the legal nature of the moratorium. This legal character will be discussed here in connection with the insurence against political risk. Precisely, because of two conditions.

First the question is exciting for the interested parties – so also for Hungarian exonomic subjects participating in such insurance contracts – in the aspect, how and within which notional frames the moratorium as a loss event can be interpreted in their insurance practice.

Second: although the moratorium can be examined also in itself, as an abstract legal category, as a matter of fact it always exists within another legal institution, as a legal symbiosis, for example like mistletoe on the tree, to refer just to this pathological phenomenon of phytology. Incidentally, the reference is also appropriate, the moratorium being one sort of pathological phenomenon. It is pathological e. g. in the domain of "normal" institutions like the general principles and values of the law of contracts (with pathological character the compulsory deferrement of payment imposed by the authorities settles itself here and suspends the classical principle of "pacta sunt servanda"). Similarly, it is pathological as to the mechanism of interstate credits and debts functioning in accordance with international treaties (also here the moratorium signalizes that an alien element has gotten into the law regulating the normal proceedings of interstate legal relationship). It is pathological also as to the differentiated civil law institution of export credit insurance, created just to provide for a therapy of dividing losses for instance in the case of transfer moratorium, one possible among the damaging events. Most probably, it is clear from what was said afore that in its "function", its real being, – thus, also in respect of its conceptional frames – the moratorium can be interpreted only in relation to actual legal institutions. An experiment is made to do so by this study, especially in connection with the export credit insurance. Viz. the real picture of the transfer moratiorium appears in this legal institution.

About the legal nature of the moratorium, especially in connection with the export credit insurance there are available practice and legal literature of such an extent which reveals the real picture of this institution and allows us to arrive at generalizations useful and appreciable also in practice. These comprise the home and foreign history of moratorium, its scientific notion and today practice. The following analyses and statements are founded on them.

3. The most important preliminary question naturaly is, what need is there for this all. This question must be answered also therefore, because our analyses will be well directed, thinking and reasoning will get their logical rhytm and the problem progressively solved by it.

Thus, the problems to be answered are, as follows:

a) To commence from far – with a world economic background: In awkward economic positions payment (foreign currency) difficulties present themselves especially in the developing countries. Many times these impede the transfer of the concluded and fulfilled agreements' equivalent. Still, the developed countries too need the markets of these states. Similarly, the developing states are also interested in maintening the foreign trade turnover, even in its increase. These two interests exist, despite the involuntary transfer moratoria. The interests are fortified by the general international, economic policy of the interested countries. The actual losses of the imposed transfer moratoria (which bring to a deadlock a great number of individual deals) finally fall to the lot of the developed contries' economy, through the export credit insurances. Now, depending on the losses and the part of the credits gotten back by the insurance companies later (when the moratorium ceaes) it can be stated that all this is nothing else than an expense factor of the exonomic acticity (expansion) of countries well provided with capital. This expense factor may often be in a billion order of magnitude for them – however in some of their balances it will be refunded, regarding their economical activity of global dimensions.

b) Also Hungary is involved in this overall picture which serves with numerous examples for us, too. Out of them two shall be emphsasized in respect of our present analysis: *aa)* what does this position mean in the export credit contracts of our companies in respect of *de lege lata: bb)* which considerations are reasonable in respect of *de lege ferenda*, under the newest developments.

aa) Also Hungarian companies are in trade with enterprises of developing contries who may get and actually get in a financial position which hinders their banks from transferring the convertible currancy equivalent of the supplied goods. Nevertheless, it can be the interest of both parties – on company and state level, too – to maintain and develop the foreign trade relations even under existing conditions. To assure the normal proceeding of the business activities, besides different other means there available for this case the export credit insurance. This is expected to protect against such a political risk as transfer moratorium.

i. When the new system of economic mechanism made the companies more responsible masters of their own activity and future, the "Notice No. 302/1968. (PK. 3.) PM – BF on the export credit insurance" declared that "companies dealing in foreign trade can effect an insurance to have refunded their active claims connected with exportation of goods and performances, also their expenditures due to manufacturing upon a foreign order" (Item 1.) Item 2. of the Notice expressively extends the possibility of export credit insurances to firm (seller's) credits, as well. Here the Notice describes the risks which are covered or be covered by the insurance. In the field of various risks, among the political ones "exchange and remittance prohibition, the prohibition or moratorium of payment" are listed. As for "Notice No. 322/1970. PM – BF on the insurance financial interests of Hungarian companies in foreign countries", it declares that the State In-

surance Company undertake "the insurance of political risks relating to capital invested by the companies in enterprises abroad".

In this place there is no more mention of the nature of political risks. Evidently the nomenclature of the previous Notice, its itemized types of loss events are decisive.

ii. On the basis of the "sources of law" analysis of these economic-political measures the State Insurance Company pursues practice of export credit insurances in the following categories of political risks, under the so-called P-(political) conditions: "Conditions of insurance for political risks connected with manufacturing for export" (Conditions of credit insurance of variant 01232 P. I.); "Conditions of credit insurance for political risks in case of export supplies and performances" (conditions of credit insurance of variant P. II.), "Conditions of insurance for political risks of capital invested in companies abroad" (Conditions of variant 01145 P. III.)

It is evident that within the conditions P – I. the moratorium or transfer difficulties generally do not crop up, i. e. they are irrelevant, as the goods against which a purchase price ought to be transferred, will not get (this is just the risk) to the customer, because of the troubles in its country.

The P – II. conditions denominante moratorium as a loss event; among others: "transfer freezing (prohibition of remittances) announced in the country of the customer, prohibition of payment or ordained moratorium" (Item c. of Para. 2.). The P – III. conditions denominate an insurance event relating to the losses of the invested capital, like "imposing of general transfer freezing or other measures of similar kind" (Item a. of Para. 2.). This latter can be understood here only so that the insurance covers also the transfers – thus, not alone the losses deriving from political risks of the captial abroad. However, the conditions mention only the exportation of the capital investment as a part of the agreement. What ought to be really dealt with in case of a transfer risk, should be the transfer of income and in case of liquidation the share of assests including also the repatriation of monetary means.

iii. However, prior to continue, let us make a remark in parenthesis: also here, i. e. in the already mentioned "sources of law" and conditions, – just as in the special literature in Hungary and abroad – the denomination *export credit insurance* has became general concerning all kinds of risks connected with export deals, which risks are due to the "sick state" of the customer's country. (*Heggi – Törzsök – Gulyás*, 109. and al. *Leloczky* 1 – 2, *Hunt*, 229., *Mezneries*, 113., *Schmitthoff*, 222., *Fulda – Schwartz*, 707 page). In the strict sense of the word the denomination *export credit insurance* would comprise only the sphere of sales on credit (contracts with firm credits). Consequently, the denomination export credit insurance has a narrow sense (this is the latter) and a wider sense comprising all detailed kinds of "export-orientated" insurances. As it can be seen, also in present study there is prevailing the latter, comprehensive variant. This remark has been dictated by the demand of precision and explicitness.

iv. Reverting to the main line of our train of thoughts: there is a company, already protected by the insurance contract, and this company is told by the "sources of law" of the said level and the insurance conditions that you are safeguarded against the risk of – „prohibitions of converting and remittance, *moratorium* and freezing of payments" (Notice),

– *announced* trasfer freezings (prohibition of remittance) or *ordained* moratorium (P–II. conditions)
– "*ordain* of general transfer freezing *or other similar measures* (P–III. conditions).

However, these categories of risk, better to say their wording are imperfect enough to determine in a clear-cut manner the commitments of the insurance company, i. e. to make beyond dispute the right to compensation of the insuree. E. g.: who and in which way has to announce the transfer freezing or ordain the prohibition on of payments? Who cannot pay in such cases? The buyer or the bank? What does it mean transfer freezing or other similar measure? Has the transfer freezing to be general and in this case the non-general freezing may not be reason for a claim for damages? Are announcement or ordain necessary, or will it be sufficient a prohibition or moratorium presenting themselves in whatever way? What is a moratorium or an ordained moratorium? The answer of this or other nature has to refer in some way to the actual transfer difficutly for sake of a such or other sort of decision (whether the insurance money is to be paid or not).

If in the first approach we lay stress on the form that the wanted condition is the transfer moratorium to be *ordained* (this is the wording of the insurance conditons, though "other similar measures" are also mentioned) there remains still the question: what shall be understood by ordaining in the relation of the buyer, the buyer's state bank and the seller? Not to mention that today the actually exercised passive transfer moratorium is more general than the e. g. statutorily ordained general moratorium – this is well known in Hungarian isnurance and foreign trade praxis (also the literature refers to this: *Leloczky*, 1.) The variants may be manifold: the customer's bank gets no convertible currency from the central bank of the state; the central bank itself would be qualified or obliged to the transfer action, but simply it does not do it, i. e. continuously it cannot make transfers in lack of the needed currency (if the central bank is at the same time an authority of foreign exchange policy, one cannot know, whether this would be a relatively separated action of the state mangement or only a banking "action"); the competent state organ of the buyer's country does not allow(by an internal measure) that the banks shall carry into effect the transfer transactions; they advise the seller, the seller's country about the lack of transfer ability without formalities, perhaps throug diplomatic channels.

v. If this tacit or passive variant of the transfer moratorium is more general, then it is questionable, whether it is a moratorium or not. If we opt for the negative answer a good number of our companies can meet

the greatest financial difficulties in spite of the fact, they have insured themselves against such troubles. However, in many cases, as we could see, the troubles are outside the insurance conditions and not within their strictly worded frames. In this way the insurance legal relationship becomes actually an idle running, it only exists but not for the purpose it serves, or not for all what is necessary. If, however, each transfer risk is regarded as acceptable, the insurance conditions will become eroded. This may cause not only a legal uncertainty, it can even upset the synallagmatic nature of the perfornance (all insurance premia) and the counter-values (the „generously" paid compensations).

Thus, there are now given the insurance conditions and rules which are not celar-cut as said above, and the increasing importance of the passive moratoria. What is then the solution ? It would be easy if Hungarian law of today knew all the institutions in question and would regulate the substantive law elements of the transfer freezing or moratorium by a positive legal regulation. But this is not the case, and this is the greater trouble with the conditions of the above cited wording. What is happening now ? The State Insurance Company and the insurees (companies) – if we presume a legal dispute between them and Hungarian law is applied – face the problem, how to qualify-interprete a foreign legal category. Otherwise a reasonable answer can hardly be approximated.

vi. Also Hungarian private international law states that if an institution is unknown by Hungarian law, to qualify it, attention shall be paid to the foreign law regulating the institution (Code of Private International Law, Section 3.). This is so especially if the private international law qualification (characterization) is perceived also as a form of interpretation of applied legal categories – just as Rabel interpreted the qualification when he emphasized the necessity of comparative law analysis (see *Màdl – Vékàs*, page 84.). Now, if we wish to detect the essentials of the institution examined in characterization by comparative analysis, we have to catch it with the content corresponding to the law of the given states. This is especially valid for the case if the institution is an internal substantial law institution of the given states *(Világhy*, page 51.). So much the more as by taking up and applying as criteria the said insurance condition categories – unknown and unregulated by our law – at least tacitly we have been sent to the law of those countries where these categories are known. This leads to the conclusion that to get a rational answer to our question, by comparative law analysis international practice (legislation, court and contract practice) relating to the moratorium has to be examned.

Though the general preamble of the Civil Code relates it to the Code itself, evidently it is a general principle of civil law: if law disregards to determine notions, this is done so because the interpretation of some notions are left to the public understanding and the explanation of others, generalization of some rules, exploration of certain correlations have been referred into the sphere of jurisprudence (Civil Code of the Hungarian People's Republic – IV. Act of 1959 and the Motivation Report to the Bill.

Published by IM Közgazdasági és Jogi Kiadó, Budapest, 1959., page 19.). I. e. to find the reasonable solution also jurispriudential points-of-view – theoretical and historical ones – are to be taken into consideration. Besides general theoretical points-of-view also the past (legal history) issues of Hungarian law, as just in the question of moratorium there are some past, even if not pleasing, experiences in Hungary, since moratorium is generally a not very pleasing phenomenon.

vii. To approach from another side the determination of the categories in question, we get to the field of general statutory interpretation. The need of interpretation is based on the situation that the facts of a case presenting themselves under life conditions are not unambigously or appropriately answered by the relevant legal norm. Here there will enter the interpretation as a legally justified factor of law enforcement. The essentials of it is that the facts are subordinated to the norm-structure of the category in question. If the norm-content of the above categories is interpreted, out of the various interpreting forms (extended, approbatory, restrictive, grammatical, logical, taxonomic and historical) the taxonomic interpretation preferred by socialist theory offers the most adequate solution. Visibly that the content of a legal notion is to be searched in its determination deriving from the notion's social function (Állam- és Jogtudományi Enciklopédia, II. köt. 798 és köv. old. – *Encyclopedia of Political Sciences and Jurisprudence*, Tome II. page 798 and foll.) Also the Preamble of the Civil Code emphasizes that although the method of interpretation is not ordained by law (the main rule is "only" that "the provisions of the law are to be interpreted in conformity with the economic and social system of the Hungarian People's Republic – Section 2. of §. 1.) and the method of interpretation is "the problem of theory and law enforcement..., still it is ordained that while applying law one shall not regard the provisions isolated from the reality whose ruling is in question and shall not consider them independent of the aims which are to be achieved just by the ruling" (see the above cited Civil Code publication, page 22nd).

It follows from the above that according to the socialist theory of legal interpretation, as well as to the normative warnings of the legislator, also in our case it will be indispensable to substantiate and fill with adequate content the conceptual denotations within the insurance conditions by taking into consideration the social function and true functional relations of the insurance institution in question.

bb) In the afore detailed ways we searched an answer to the dispute of the concluded insurance contracts of the compaines, i. e. what is the normative conceptual content of the moratorium beside the outlined legal conditions. The other great problem to be touched upon, if only in its main correlations is: whether it would not be necessary, quasi like *de lege ferenda*, to think over again and redraft the Hungarian provisions of law of the export credit insurance, beginning with the insurance conditions on a way backward, through the "Notices" up to the more general source of insurance law, the Civil Code

4. Summarizing the above preliminary questions (their long extent may perhaps be excused by the clearcut and correct exposition of the questions, this being indispensable for the proper answers), the train of thoughts of our examinations goes as follows: by which general scientific statements and definitions does theory express moratorium (II); what can be read from the Hungarian legal history of the past as regards the essentials of moratorium (III); what is told by comparative legal analysis about the international practice (IV); how can the content of moratorium be interpreted within the more general internal (national) function and the today's life conditions of the export credit insurance (V). After having gone through the pathes of these chapters, the summarizing deductions may follow already more abstracted.

II. Moratorium in the generalizing statements of jurisprudence

5. To start with, it can be stated as a fact that in economic and legal life and terminology, in the everyday language of the institutions in question the denomination export credit insurance covers an almost unambigous content. Not so the moratorium. In the more superficial professional writings the moratorium is mixed up with the transfer freezing, the rescheduling of credits, with the postponed payment due to the insolvency of the obligor and with other occurrences. Though moratorium itself is differentiated in itself and covers a multicoloured internal picture. This is well shown by the relevant general theoretical statements of literature on law and its generalizations to determine the concept. If we wish to display them in a reasonable order of sequence, on basis of the sources *(Black's Law Dictionary, The Dictionary of English Law, Frankman, Fulda—Schwartz Görög, Haendel, Hunt, Leloczky, Lowenfeld, Schmitthoff, Szladits, Wörterbuch der Aussenpolitik und des Völkerrechts)* the following can be said:

6. The moratorium is deferment granted to the partner obliged to pay. (E. g.: "The moratorium . . . generally postpones the term fulfilment of the payment" *Görög*, page 554.; "A term designating suspension of. . . . remedies against debtors, a period during which an obligor has a legal right to delay meeting an obligation", *Black's Law Dictionary*, page 1160). With such a general content the moratorium is a category appearing in more branches of law: it is handled as an institution by civil law, public international law, international financial law as well as by international commercial law (the law of international economic relations), these latter especially in connection with the export credit insurance.

7. There exists an internal moratorium leading to postponement of liability to pay and there is, wellknown in wide circles, the moratorium for delay of international payments.

8. The moratorium can be special or general, depending on its being meant to individuals or to the whole class of debtors or debts. Though debatable, mostly that too is called moratorium (an act of civil law) when the debtor asks for and gets a respite from the creditor via private or com-

pulsory settlement („Moratorium is suspending all or certain remedies against debtors" . . see above, Black's Law Dictionary, page 1160; "The general or partial moratorium delay the term of fulfilment for the debtors in general, or for a certain group of debtors", *Görög*, page 554.; a moratorium granted by a private person "although it is destitute of the statutory interdict, however, also such a delay is obligatory for the creditor, in so far as in case of enforcement prior to the expiration of the delay, the debtor may raise successfully the defense in form of *exceptio dilatoria*", *Haendel*, page 4.; formally the interstate moratorium-treaty has a similar trait, as also in this case not an external command of law will produce the postponcement).

9. Generally the moratorium is an extraordinary and temporary measure, i. e. situation connected with the extremely difficult economic position of the obligor or its country. "Moratorium operates during financial distress", as *Black's Law Dictionary* puts it. "Moratorien werden in Zeiten wirtschaftlicher Notlage angeordnet" – writes the *Wörterbuch der Aussenpolitik und des Völkerrechts*, page 420. Haendel takes as conceptual element of moratoria the special character of circumstances causing a moratorium, i. e. the moratorium's "concomitant", its reason and basis are "that *extraordinariness of relations and conditions exists*" (page 8.). For example war, the situation following it, political or economic crises, natural catastrophies are to be taken into consideration. Owing to the crisis of 1928/33, also the financial state of the Hungarian debtors, even the foreign currency state of Hungary have been qualified so, and the moratorium rules issued at that time were based on this, that "there was imperative need to issue them, to avoid the *imminent danger* jeopardizing the Hungarian economic and credit life" "Act XXVI. of 1931 on the safeguarding of the order of economic and credit life, as well as of the balance of state finances; general introductory preamble). On the international forum a similar kind of thought is expressed by the developing countries: "When because of *force majeure* conditions economic hardship afflict a country, the monetary authorities can postpone payments due by its residents to residents of other countries" *(Curutchet*, page 22.).

10. It is in close correlation with the afore said that as another mark of moratorium there appears its temporary nature, i. e. this form of state intervention in civil law relations is restricted but in case of emergency and only for the time of emergency. Connected with this exists the further peculiarity, viz. that the institution of moratorium – besides that it means a payment or fulfilment delay to the obligor- does not touch upon the right and rightfulness of the claim.

11. Another specialty of the moratorium is that – excepted the various actual or concealed moratoria (see Point 17. infra) in general – the period and other payment conditions of the moratorium is fixed by the adequate state act or interstate treaty. "Ein Moratorium erfordert gleichzeitig die Vorsorge für eine künftige Schuldenregelung" – writes the *Wörterbuch der Aussenpolitik und des Völkerrechts* (page 420). In den sog. Stillhalteabkommen werden im allgemeinen Art und Umfang der Verbinlich-

keiten, deren Bezahlung eingestellt wird, die Dauer des Zahlungsaufschube und der Weg des Schuldenabtragens festgelegt."

12. In the relation of states there is known the so-called international moratorium decleared by interstate treaties. There was e. g. the Hoover-moratorium, by which Germany has been granted a deferment of its reparative payment liabilities after World War I. Similarly, the London Moratorium Treaty of 1953. where the GFR and 20 capitalist countries agreed on the postponed payment of the German debts existing before and after the 2nd World War (See in details, *Wörterbuch der Aussenpolitik und des Völkerrechts*, pages 420–421.).

13. Contrasting with the above is that kind of moratorium – and for a long time it was held as the moratorium in the strict sense of the word – which is founded on a unilateral internal state measure: a law or another decleared authority act permits a postponed payment to the debtor. Here an act of public law intervenes in the spehere of private law, after all to the private wrong of the creditor – though this wrong is less serious in respect of the main interests. "The operation of a law or of an order, decree or regulation having the force of law, which ... restricts ... payments" – is to be read in *Schmitthoff's* (page 222.), when he writes about one specialty of the moratorium.

14. In some countries, i. e. in the old French, German and Hungarian law of crisis there was known also the moratorium which was granted to the debtor by a court decision Thus, as moratoria there were taken all the matters when by a legal rule authority, and if the cases and conditions were as determined in the provision of law, the court could decide in an actual case, whether its facts and elements correspond to the situation priviledgel with a moratorium by the regulation. This latter form has been called "judicial right of delay". "Here the interdict based on the law and realizing itself in its positive form of postponement, was not operative directly by the virtue of the rule ordering the moratorium, but indirectly – though deriving from the rule – following a judicial decision" *Haendel*, page 9).

Somewhat remote from this is the Hungarian practice applied in critical times, when the right to modify contracts of the courts has been widely supported in the sphere of economic impossibility of performance *(Szladits*, page 555.). This, however cannot be drawn in the sphere of moratoria because of the following: though the reason and the form realizing itself in the delay of payment allies it with the moratorium, as a matter of fact, the point is the general institution of judical modification of a contract possible within lasting legal relations. Mutatis mutandis, we are speaking about the "modification of a contract in judicial way" in our present law regulated under the same title by § 241. of the Civil Code.

15. The transfer-moratorium is a kind of moratoria for the payments due to transactions in the international trade. This means that – connected with the above, detailed supra 9 – in the country which has difficulty with foreign currencies, an internal state measure interdicts or makes impossible for the bank of the customer to transfer to the seller (to the seller's

bank) the purchase price in the convertible currency stipulated by the contract and paid by the customer to his bank in home currency. Exceptionally there occurs in foreign trade also that sort of moratorium, when higher state measure interdicts the debtor to effect payment, thus, it makes impossible the transfer even in the bud. "Im Aussenhandel besteht das Moratoriumrisiko auch darin, dass in einem Schuldnerland ein Moratorium erlassen wird, das den Zahlungspflichtigen die vertragsgemässe Erfühlung der Schuld verbietet" – writes the author of the study on moratorium in the *Wörterbuch der Aussenpolitik und das Völkerrecht* (page 421).

The transfer-moratorium – as already dealt with in the introduction – appears in a differentiated form mainly in connection with the export credit-insurance in the international practice and literature. The legal and economic correlation is definitely logical and rational in literature: partly, because moratorium is one of the loss events in the credit-insurance contract, partly as the main function of the export credit-insurance is just to safeguard the normal progress of affairs despite the difficulties and to support the economy of the exporter country, its competitive position abroad and hereby also to help the buyer's country in solving its temporary difficutlties with foreign currency.

16. The transfer-moratorium has a closer mode of existence: the one which is founded on an expressed declaration (order, decree or other published regulation) of the bouyer's country. For example, one (iv) clause of the export credit-insurance contracts recommeded by the British ECGD reads: "The operation of a law or of an order, decree or regulation having the force of law, which in circumstances outside of the control of both the exporter and the buyer prevents, restricts or controls the transfer of payment from the buyer's country to the UK" (see by *Schmitthoff's* page 222). By such a strict sense of transfer-moratorium every other transfer-difficulty (effective transfer-difficulty) falls outside the loss event, the sphere of insurance risks marked with moratorium.

17. In the practice – accordingly also in legislation and literature – there has recently appeared the so-called disguized or covered moratorium. Contrarily to the moratorium declared by a provision of law, the events especially of late years signalize much more the fight with such a moratorium which is also due to the actual or temporary foreign exchange „insolvency" of the debtor's country, it is, however not declared in the above way, simply the banks pursue it de facto. As we have already seen, this may have many forms: the concerned state banks use delaying tactics for the transfer, without talking too much; they advise in words or in any other way that they have no money and cannot pay, ask for patience, they will pay later on; perhaps they officially inform the embassy about the moratorium circumstance; the government or the authentic governmental organ takes such measures that temporarily the banking house does not get foreign exchange for certain transfers ("Versagung der Devisenzuteilungen"), in other words the bank gets a command for temporaty transfer-freezing.

"Von einem *verschleierten Moratorium* wird gesprochen, wann Schuldnerstaaten die Einführung Devisenwirtschaftsmassnahmen dem Erlass eines Moratoriums vorziehen" – as the more times cited *Wörterbuch* (page 421) puts it differentiatedly and plastically. But this is revealed also by other literary sources (see e. g. *Leloczky, Schmitthoff, Loewenfeld, Fulda–Schwartz)*, while the *Black's Law Dictionary* says it with British pragmatism: "Moratorium ... is a permissive or obligatory delay ... *sometimes* authorized by law", page 1160, emphasize added FM).

Literature and practice unambiguously show that this tacit or covered moratorium is more general in our days, its is more exciting and substantial in respect of insurance reliability, either pro or contra, since more hundred millions are concerned in each case.

18. One – mainly elder and more conservative – position is that the covered moratorium is not a moratorium, thus, it is not a loss event. The moratorium is an emergency act and exceptional intervention in the general order of obligations and it can be interpreted but strictly and not expansively.

According to the another position the covered or disguized moratorium is also a moratorium, also a risk which cannot be excluded from the political risks. The moratorium-insurance has to comprise it so much the more as what would happen to the insurance background, if it were not functioning just there, where the risks effectively present themselves. It is the moratorium-conception independent of the concrete cause (form of provision) which is applied by countries having great experience in insurance; in addition to the afore cited ECGD-clause (covering the legal, declared moratorium) the relevant ECGD-conditions expansively say that" "*any other cause* not being within the control of the exporter or the buyer which arises from events occurring outsied the UK", and are hindering the transfer of the purchase price (see *Schmitthoff*, page 222).

After all, what is at stake here is the strict or expanded interpretation of the moratorium and this cannot be made independent of the concrete legal regulation of a given country, i. e. of the interpretation applied in this country, either of the fact, what is the economic- and legal-policy aspect of such countries as regards the export credit-insurance.

Summing up the generalizing statements of theory, also in this correlation there is clearly revelaed the legal theoretical thesis, according to which the essentials of legal conceptions tend to generalize, summarize on a higher level the various individual variants and hereby to the coming into existence of a notion which comprehends also the different subvariants. So in theory the moratorium turns into an overall conception of all kind of moratoria.

III. Moratorium in the earlier Hungarian law

19. Though the institution of moratorium has "flourished" and considerably developed in Hungarian law before and after World War I, it is not a Hungarian invention. To wirte here a general history of moratoria would lead us too far, that is why regarding the precedents of Roman law (moratoria praescriptio, C. I. 19. 2.) and of other laws I refer to literary sources (*Haendel*, pp. 9–12, *Wörterbuch* page 420: "Moratorien sind bereits seit dem Altertum bekannt").

In Hungarian law the moratorium grew to such considerable size in the said critical times that only until 1930 there have been published fifty studies on the moratorium (see *Károly Szladits–Miklós Ujlaki:* Hetven év magánjogi irodalma. – Civil Law Literature of Seventy Years–Grill Könyvkiadó, Budapest, 1930. under key-word "Moratorium").

20. Before World War I the history of moratorium dates back to 1848. Among the moratorial measures of the centralized legislation there is mentioned §. 5. of Act IX. 1848. (relating to the debts of landowners due to difficulties casused by ceasing of the socage). This lasted – by different prolongations – until 1859, in Transylvania till 1860), when the compensation amounts were remitted to the landowners. Following this, a partial moratorium was ordained in 1879, because fo the flood in Szeged.

The "golden age" of the issue of moratorial rules was World War I, The provisions of law concerning moratoria are issued at a ministerial level, based on the power invested by §. 16. of Act LXIII:1912, passed by all ministries about the exceptional measures in case of war. According to this § "the ministry may take extraordinary measures, consequently it may make rules different from the law in force, in respect of the enforcement of private law claims-included are also the claims based on bills of exchange – also for civil action cases and for those of no legal action, thus, generally in respect of common law jurisdiction."

In possession of other powers connected to this provision of law the government passed 23 decrees relating to the institution of moratorium during World War I. Decree No. 3715/1914. P. M. enacted the first general moratorium. However, the Hungarian form of realization of moratoria can be better seen on basis of the second moratorium-decree, viz. this is much more ample. The moratorium-decrees followed each other directly, as they were valid generally for 2 weeks, or one-two months and joined with each other in time.

The most important elements of the moratorium decrees were:

a) the moratorium is based on a promulgated law;
b) by determination of the character of assets, also the sort of moratorium is determined (e. g. claims founded on a bill of exchange, assignment, warehouse certificate, or other commercial consideration, or further claims based on other titles of private law);
c) determination of the date whet the claim had to be arisen for its baing subject to a moratorium;
d) appointment of the date when the claim has to be due;

e) period of the delay ensured by the moratorium;
f) decrees on the interests during the moratorium;
g) exceptions to moratorium;
h) position of current accounts and deposits (generally the withdrawals were restricted, only a fixed amount of the capital could be withdrawn).
i) Considering the *international implications* of moratorium, the corresponding decrees order in general – with regard to the similar ruling of the neighbouring countries – that "if a Hungarian citizen can collect his claim of private law at a lesser degree or with considerable restrictions in a foreign country, as prescribed by the present rule, the claims of the debtor of such a country shall fall under the same restrictions in the countries of the Hungarian Crown" (second moratorium-decree, § 11 of 12. August 1914). In the sense of another manifestation of the financial reciprocity "if in another country the moratorium granted there does not cover or covers only a sphere limited more than generally the private law claim of a Hungarian citizen or an inhabitant of the countries of the Hungarian Crown, the debts of the nationals of such countries ... fall under the same restrictions in the countries of the Hungarian Crown".

The decrees on the geographic coverage of the rules tie the institution of moratorium to the "Hungarian Crown". Naturally, if follows here of that with the above corrections the moratorium has an extraterritorial coverage in respect of the Hungarian debtors: it is effective also against foreign creditors.

Circumspectly, the legislators have settled also those matters when owing to private international law conflict, the substantive law of other states could be decicive, so the moratorial decrees would be left out of consideration and hereby the payment obligation of the Hungarian debtor ought to be ascertained. To avoid this, each decree included a clause according to which "all judical privisions which would deprive the debtor of the moratorium normative in the countries of the Hungarian Crown, or would deprive him of the rights connected with the moratorium against his will, are to regarded as offending the national prohibitive law (public policy) and as contrary to the purpose of the national law."

21. The national economic difficulties after World War I, as well as the world economic crisis beginning in 1929 resulted also in Hungary in a general economic and foreign exchange crisis, so moratorium-legislation became again timely, among others in the following main fields:

a) The Act XXVI:1921 stated the moratorium of national debts. Act XV:1926 § 17 declared for all pecuniary claims which would be collected against the state (post, telegraph service, municipalities, etc.) that in such cases the proceedings can be suspended in whatever stage, until the revaluation of the debts of private law is arranged by law, however, by the end of 1927 at the latest. Act X:1927 declares the same about the claims aga-

inst the private insurance compaines. Act I:1928 has prolongated the term of all these.

b) Decree No. 3800/1932. P. M. enacted on basis of the statutory power and its prolonging decree on the "temporary restriction of collection of certain farmer debts" granted a moratorium to the indebted farmers; this became a part of the Hungarian crisis law under the name of „protection of farmer-debtors" – making not too much honour to the Hungarian capitalist private law.

c) A third group of the moratorium-provisions wes bringing foreign exchange law into Hungarian legal life. The Act XXVI: 1931 on the "Order of economic and credit life, further on the safeguarding of the balance of public finances" forecasts the lot of prime-ministerial decrees by which "to maintain the strength necessary to the economic aims of the nation" they blocked, i. e. restricted the transfer in foreign currencies of debts paid down in Hungarian currency (Decree No. 4100/1931. P. M.). There has been such a form of moratorium – in the Decree No. 4200/1931. P. M. – too, that to protect the foreign exchange position of the state, the banking houses were simply closed i. e. they had to be closed on fixed days ("as these days were Sundays regarding the fulfilment of private law debts"). Also these decrees included times fixed, if they expired, newer decrees were issued with new time-limits (e. g. Law X.: 1933 and Order No. 4300/1931. P. M.). This kind of legislation had a rather negative international reaction, so much the more as generally the foreign forums had not yet acknowledged the extraterritorial aplication of such provisions of law. From this there have followed the so-called bond-lawsuits, legal proceedings taken abroad against Hungarian debtors, by which actions they nevertheless became losing parties, as they could not pay because of the transfer-freezing. This became the cause of many troubles, as foreign forums often seized under this title the assets of the corresponding Hungarian compaines arising from their export activity abroad. The situation has but slowly eased, by the liberalization of the foreign exchange rules.

If the important elements of the above legislation are compared to the main legal elements of the previous era, the following novelties can be observed:

First of all the existence of transfer-moratorium itself.

On the other hand its many forms: e. g. simple restriction of access to the banks (restriction of their business hours), such restriction of foreign exchange transfers that the debtor could effect a payment only under the restrictive control of the National Bank of Hungary.

There have appeared moratoria with uncertain term and paralelly there were increasing also delays of 15–30 days – though they were prolonged.

Especially in the foreground there is always the motive of the moratoria-decrees, the repeated normative expression of „emergency case", actually embarrassed and apologetic preambles as an explanation of the enacted decrees (e. g. „the danger jeopardizing the Hungarian economic and credit life", as „imperative need" of issuing the moratorium-decrees in the Preamble of Law XXVI.: 1931).

IV. Moratorium and export credit insurance in the international practice of today

22. In the today's western practice of moratorium and export credit insurance there are prevailing the functionalism, also the pragmatical ruling conceptions corresponding to this and by no means philosophism and pettifoggery. What the western states are interested in, is the economic and legal policy aim of the institutions in question, the reality within which they have to fill their part. This will not mean that legal-dogmatical ruling is of less importance. Only that they emphasize the priority of the function and in comformity with this, the institutional and dogmatical ruling are more ample and offer more warranty for the insuree. They are more interested in the symptom itself, while names, denominations, conceptions and actual circumstance of cases take the second place in their way of thinking.

It is a well-known fact that common law originates in classical Roman law (contrarily to the European civil law of post-classical origine). This is emphasized also in problem-orientated aspects (problem-resolving instead of general systems and theories), and cited is the classical thesis of Roman law, i. e. "omnis definitio in iure civile periculosa est" – in civil (Roman) law all definitions are dangerous. This aspect has generally developed in the past decades, also in the countries of Western Europe and especially in the circle of problems examined here.

23. However, prior to our having a look into the economic and legal policy background of moratorim and export credit insurance founded on the above aspects, let us see in respect of positive law – thus, in its dogmatical regulatedness – what is the transfer-delay or moratorium existing within the frame of export credit insurance like.

a) Already within the still existing range of definitions one can experience the practice-crientated elasticity, i. e. that the moratorium is not of this sort or that sort, but both, a bit like this and a bit like that. I have already referred to the key-word "moratorium" of *Black's Law Dictionary*, according to which "moratorium is a term designating suspension of all or of certain remedies against debtors, *sometimes* authorized by law ... A period of permissive *or* obligatory delay of payments" (page 1160, emphasis added FM).

As it can be seen, it is a vague definition of the concept. The regulation which grants such wide frames for the export credit insurance, keeps evidently in view the entirety of damages (insurance events) on whatever ground of moratorium they arised.

Above in (16) I have cited that in British law one of the loss events is the transfer-delay following of an explicit state act or declared provision of law. Thus, here the moratorium appears in its classical, strict sense. However, the same ECGD-insurance conditions spread the veil of the disguised or covered moratorium to any other causes, too (as it has already been dealt with above: 18.).

The American insurance law does not operate at all with this grouping. The OPIC (Overseas Private Investment Corporation) and the FCIA

(Foreign Credit Insurance Association), the corresponding laws show already in their name the more ambiguous mission they have ("Guaranty Provision of Foreign Assistance Act as of 1965 – 67 and as of 1975, *Lowenfeld*, II. pp. 409 and foll.) They know three categories of political risk. Section 234. of the 1975 Act (equally to the earlier ones) declares: "*A)* Inability to convert into US dollars other currencies, or credit in such currencies . . ., *B)* loss of investment due to expropriation or confiscation. . ., *C)* loss due to war, revolution or insurrection".

As it can be seen, there is an objective phenomenon at *A)* – the transfer-impossibility: "inability to convert into US dollars other currencies" – and this is not attached to any condition, law, order or other prohibition of legal force.

Remarkable that the British "dichotomy" returns, when only the "convertibility guarantee" contract conditions are mentioned (see *Fulda – Schwartz*, page 707). According to this, the insurance event occurs: a) *if the creditor "is prevented for a period of thirty consecutive calendar days* from effecting the transfer of such local currency into US dollars – by operation of law, decrees, regulation or administrative determination recognized as being in effect by the governing authorities of the projects country". . . .; a sixty day transfer delay is necessary if the *b)* variant is concerned, viz. „*failure* of that agency of the governing authorities of the project country which legally or under the *color of law* controls the transfer of local currency into US dollars" (emphasis added FM). Thus, besides the mere "inability" if it lasts for x time, it is enough when the difficulty derives from the non-acting ("failure") of such an "agency" which is "under the color of law" competent in transfer-affairs.

In the insurance practice and literature of political risks there is well-known the name of *Hunt* who summarizes in an adequate manner this regulation-conception of the moratorium or inconvertibility, when he says (meanwhile, it is worth to mention that he has seen personal practice of long years as one of the leading juris-consults first of the OPIC, later of the US Department of Commerce, thus, on the side of the insurers): "These insurances are meant to compensate the insuree, if the transfer stipulated by contracts come up against obstacles". . . The British and the American (OPIC, ECGD) insurance conditions clearly express, they offer the insurance security independently of the fact, whether an "unexplained transfer delay" or a transfer-freezing due to positive legal measure is concerned (*Hunt*, page 229).

This conception has grown in strength also by the tests of practice (about this a detailed analysis can be found at *Lowenfeld*, II. pp. 140 and foll.). In the frame of the "chileanization" program of the Chilean copper mining, still in the Frei-administration's time there were sold 51% of the American coppergiant Kennecott company to the favour of the Chilean Codelco state-owned company. Kennecott credited the pruchase price and the amount had to be paid by instalments, during years. For this amount Kennecott effected a "political risk" insurance with the OPIC. However, the Allende-administration made a headway and nationalized the copper

mining, also as regards the unpaid purchase price. This did not happen without compensation, still the paying stopped, "the payment has been suspended not repudiatated." After a long dispute, in 1972 the OPIC paid 66,9 million dollars as lump sum compensation "in an out-of-court settlement", since – they told – by nationalization there ceased to exist the subject of law which had undertaken the obligation to pay the credit and although the nationalization did not deny the claim for damages of Kennecott, nevertheless the transfer of the instalments were suspended, as a matter of fact. Naturally this had as a consequence that Kennecott "released" OPIC from all its obligations arising from the insurance contract and ceded to the OPIC each of its claims against Chile and Codelco.

Under partly similar circumstances it came to legal proceedings between OPIC and the other American copper-giant operating in Chile: Anaconda. Incidentally, this was the litigation of highest amount in dispute within the framework of the American Association of Arbitration: Anaconda claimed the payment of 171 million dollars as insurance money. In its decision of 17. July 1975 the arbitration court admitted that Anaconda is right in the disputed matters – in all interpretation of the OPIC insurance conditions – however "leaving to the parties the task of working out the amount to be recovered". It is another question and out of our line that before the US District Court for the District of Columbia the OPIC instituted proceedings to disaffirm the decision, referring to the personal interest of one arbitrator and therefore no agreement was arrived at on the amount in question either (*Lowenfeld*, II. page 143).

The ,,inability to convert" (transfer inability) is a conception which veils – practically comprises – the transfer moratorium. Prior to our taking stand of its important comparative law consequences and elements, let us state in brief –as it comes under these thoughts – that the above conception prevails in France and the GFR, as well (see *Dunas*, European Export Credit Agencies, *Leloczky*).

According to the insurance conditions of the German HERMES Kreditversicherungs–A. G. the political risk has already came about by the fact that the payment suffered a delay of at least four months and there was no possibility at all to collect the clain in whatever form.

Also the insurance conditions of the French COFACE (Compagnie Française d'Assurance pour le Commerce Exterierur) state, it is enough to the lawful claim for the insurance money, if "the performance of the debtor does not take place or has been postponed, because of the political events, economic difficulties *or* legislation in the debtor's country." Thus, there is no need for a transfer-freezing or ordained moratorium declared by a law; two facts will do: the effective moratorium (non-fulfilment, delay of transfer) and the economic difficulty.

b) The still existing conditions concern not the sphere of risks (legal or other declaration), but other concrete circumstances. These are expressed by the insurance contracts (policies) often of 20–30 pages. Each policy contains, besides the General Terms, the unique conditions relating to the particular insuree and the actual case (Special Terms and Conditions Appli-

cable to a Particular Party). Let us see such conditions (*Gilbert – Marra* pp. 219 and fol., *Meron, Hunt*, pp. 228, 230, etc., *Lowenfeld*, II. 142., *Schmitthoff*, pp. 222 and foll., *Rendell*, page 44, *Dunas* pp. 229 and foll.):

aa) there was no difficulty to transfer the purchase price when the contract had been concluded;

bb) the insurance relates to difficulties of hard currency transfer of the future;

cc) a stipulation of the insurance is that when entering into the transaction, the insuree paid due attention to the foreign exchange legal rules of the country in question;

dd) this insurance does not safeguard against losses due to the devaluation of currency;

ee) in case of fulfilment of its commitments, the insurance agency assumes the rights of the insuree in respect of the claim;

ff) the issue is concerned with a country with which the state of the insuree (e. g. the USA) has a bilateral treaty saying that the state of the exporter supports such transactions which serve also the development-economic interests of the host-country and which will – in case of an insurer's compensation – accept the subrogation rights of the insurance company;

gg) in case of legal disputes the parties accept the decision of a court of arbitration;

hh) the insurance money is due if the claim really could not be collected for a defined period, i. e. the transfer did not come about;

ii) an important element of the insurance policy naturally is the insured amount (value, claim), as well as the self-participation in losses, this is of changing but generally of not too high (10 – 15%) ratio, finally the insurance premium.

The insurance premia of the OPIC range from 0,5 to 1%, they are higher only in determined fields (e. g. if ventures of oil industry investments or of partnership are concerned, it reaches or exceeds 2%).

In the praxis of the British ECGD the insurance premia are about 5%.

The French COFACE works with a visible and a concealed insurance premium. The visible components move between 0,25 and 0,85%. Besides this visible – better to say: general – premium, in the actual contract the insurer fixes also an additional, "on a case-by-case basis" premium, depending on the actual case (this is the concealed premium).

The German HERMES company has rates of premium around 0,6 – 1,5%.

The insurance premia vary around the above values less depending on industrial branches, better on the fact, how many risk factors can be expected relating to the country with which an actual insuree enters into contract.

24. Having already examined and seen the positive law morphology of the phenomenon "moratorium in the export credit insurance", it appears to be reasonable to examine its economic and legal political aspects, too.

The beginning dates back to World War I and the world economic crisis, viz. that the countries in their foreign exchange distress resorted to protective means unusual so far: they introduced foreign exchange restrictions. These had many forms: beginning with the international payment transactions subjected to a permission, through the transfer-freezing up to whatever kind of moratoria. The said measures were generally resorted to by the poor or weaker countries. The means, the foreign exchange restrictions were meant to be transitional, and had for a long time no extraterritorial force. During this time the debtor, who could not effect payment e. g. under title of moratorium, could have been "beaten", sued at law abroad. In the aforesaid I have already referred to the co-called "bond suits" against the Hungarian debtors.

The courts have not accepted the plea that the debtor is in no position to pay because of foreign exchange restrictions. In jurisprudence this practice was generalized in the most clear way by *Neumayer's* "International administrative law" (Internationales Verwaltungsrecht) published in 1936. He has urged that if in an actual legal case or transaction the elements of private- and of public law are mixed, the following is to be taken as starting-point: the private law elements are neutral, the state is not "therein", but quasi "beyond" them (Unstaatlichkeit). They may claim acceptation and to be applied also abroad, and they can be transplanted to whatever foreign forum by way of private international law norms. However, in the public law elements the state is "inside" directly. And the state as a sovereign may function only on its national territory. That is why its norms of such nature – like the publice law norms in foreign exchange cases – cannot be accepted abroad (*Evan*, page 222).

The problem, as well-known, was neuralgic and exciting. Just for Hungary, too. The effect of monetary rules on the payment transactions of concrete affairs, also the actual correlation of monetary law and private law (commercial law) became one of the main problems also of ILA (International Law Association). Under the title "International monetary law" it is an often recurring subject of the ILA-conferences. The ILA-volume entitled "The Present State of International Law" reveals the increasing pressure put on international law by the Budapest conference of ILA, 1934. i. e. that the extraterritorial force of the monetary law ought to be accepted everywhere (*Droit monetaires contemporain*, pag 275.).

As it is well-known, this opinion has successively gained ground and the Conventions of Bretton Woods – the GATT and IMF (International Monetary Fund) conventions – have declared already as general international law principle the right of states to apply in difficult situations monetary restrictions and that these are to be honoured also by foreign fori (IMF Convention, Art. VIII.). The causes of the change are known: the troubles concealed in monetary law have not remained transitional, they "propagated" also in developed countries, also the crescendo voice of the developing countries begun to be heard better and better.

Defence against the recognition of foreign exchange law – under the title of protection of rightful private law claims, the private sphere, the

theory of pacta sunt servanda – has not died down up to now. To interfere in a retroactive way by subsquent public law regulations with the transfer of the price of *delivered* goods will mean an abuse of the IMF principles which were meant exceptional – says e. g. *Mann* ("the IMF VIII/2) a stipulation allows restriction, it does not allow however that the states apply restrictions exceeding the limits of the principles of customary international law, fully at their discretion... This Clause – the VIII/2) a – does not cover the abusive administration of exchange controls" (page 220). Others emphasize – directed mainly against the socialist countries (true that refering to such court decisions) – that the recognition of extraterritorial force may not be expanded to countries which are not members of the IMF (Silard, page 60.).

However, since Bretton Woods the essence of matters is – and this generalizing statements are definitely lead by the points of the developing countries – that "the application by government of exchange restrictions is generally regarded in international law as an overriding and inherent power necessarily possessed by governments to protect their people; consequently, the imposition of exchange controls, however unexpected, is not ordinarily treated as a compensable injury" (*Allison* Capital Controls in Latin-America, page 164.), however this thesis is expressed also by § 198. of "Restatement Second of Foreign Relations Law of the US" as of 1965.

Also the interest of developing countries is revealed by the Argentine Curutchet, who says – referring already to the payment and transfer difficulties connected with the actual transactions – that "When because of force majeure... for which a government is not responsible, e. g. economic crisis, a temporary depression in the price of its exports... conditions of economic hardship afflict a country, the monetary authorities can postpone payments due by its residents to residents of other countries, but in that case ... the monetary authorities shall undertake to pay the debt in the currency in which it was originally contracted within reasonable terms" (*Curutchet*, page 226).

Even the legal dualism of Neumayer proves to be no more tenable (true that just as regards moratorium he saw from the very first a possibility for exception, *Neumayer* Tome IV. page 247), as in the legal institutions ruling the international trade and payments there can no more be divided the "private" and "public" factors, either in the Occident or in the Orient, thus, there is no more "Unstaatlichkeit" and it is rightful to speak about "transnational law", international trade or private international law with public law elements, (*Evan*, 222. page). This same author publishes theoretical comments (page 253) on the fact that the statutes of the IMF – postulating the world economic realty and requirements – intergrated or at least tried to integrate the national aims and interests of the single countries with the general, international purposes. In the domain of the former there are naturally pretaining the safety of the national economy, the solvency, safety of the balance of payments and to the latter – among others – the undisturbedness of the international turnover of goods and money.

Hereof there are deriving many institutions of GATT aiming at the liberalization of goods turnover, as well as Art. XII. This says that as long as the rules codified in the GATT are respected, "the member states may restrict the quantity of imports in order to protect their foreign monetary position and their balance of payments." Similarly, there is originating hereof Art. VIII. of IMF which states this dual principle already for current payments. Point *a)* of Para. 2. declares the main principle, viz. that "no member shall, without the approval of the Fund impose restrictions on the making of payments and transfers for current international transactions". Originally Art. XIV. stated for temporary situations after war, in its Second Amendment for the joining new members, while Point *b)* of Para. 2. Art. VIII stated generally, that under conditions and proceedings according to the IMF-statutes the members can maintain such restrictions with a regard to their position. According to Point *b)* "Exchange contracts which involve the curreny of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall not be enforceable in the territories of any member".

This is plain speech, even if in judicial practice and literature there was not superfluous to attain unambigous interpretations. Some of them: *a)* the Point *b)* in question will not invalidate the actual exchange contracts, in only denies them judicial assistance at the same degree as they are contrary to the debtor country's exchange control rules of that time when the creditor ask for the fulfilment of the contract (the payment) – (*Silard*, page 58). *b)* In the circle of the possible various interpretations of the "exchange contract" today the judicial practice is uniform in the fact that there is meant broadly any contract which effected on the foreign currency of any member and through this its exchange reserves and international payment position (*Silard*, page 58). *c)* Literature underlines that the possibility ensured by *b)* cannot be treated arbitrarily (misused) and with a character of discrimination; this latter is declared also by Para. 3. of Art. VII (*ILA propositions*, page 251). It is also clear-cut in Para 2. of Art. XIV that the exchange restricting measures in question may be but transitional and payments submitted to moratorium only until the given motiveexists

This is now the course of development in which the principle of law became general, i. e. that moratorium-steps taken in foreign countries as part of their monetary law are to be accepted also by foreign forums. Thus, to solve difficulties arising from the moratorium-conditions, other ways had to be searched for. One of them is the export credit insurance. This is all the more so that also socialist countries follow this practice. What is more, in respect of moratoria also the socialist sources support the claim of the developing countries that in the course of putting forth a new world economic order, they may better use the institution of moratorium, if this "um den Anteil des Schuldendienstes an den Exporteinkünften der Entwicklungsländer und generall den Kapitalabfluss aus diesen Ländern zu verringern, erforderlich ist" (*Wörterbuch der Aussenpolitik und des Völkerrechts*, page 421).

25. So we got to the moratorium-export-credit-insurance problem's economic and legal policy background.

After the legal acceptance of the initially opposed moratorium- practice, to maintain and safeguard the turnover of international trade contracts (purchase and other deals, as well as their payment transactions), the same countries have "found out" one of the solutions: the insurance. As a matter of fact, the export credit insurance of the outlined, broad interpretation is the "invention" of the states. True that for war (thus, political) risk the Lloyd offered marine insurance as early as in the years of 1700; that too is true that in the insurance of political risks the private insurance branch came in too. E. g. the New York Insurance Exchange has been, already since 1979, a great stock exchange of this insurance branch, having the main advantage that by way of reinsurances also the private insurance companies can increase their undertaking capacity (*Hunt*, page 226). All this is true, nevertheless, the insurance operating with such an advantageous condition-system as sketched above, comes from the States and it is a product of the recent years. The fact is not altered at all by its goals which serve the capitalist economy, thus, the operation of the private capital. The fact that in the axis of the broad moratorium notion and export credit insurance system there is to be found the state economic-political aim, is proved by the following.

a) In the industrialized countries state banking institutions were established for the export credit insurance, not only in the USA, Great Britain, France and the GFR already dealt with, but also in other countries (see the list of insurers at *Hunt*, page 233). In the USA in 1975, the OPIC was established by an Act – also its predecessor after the world War II – with the aim that "it shall be an agency of the United States under the policy guidance of the Secretary of State", its president is appointed by the president of the United States, with the approval of the Snate. The financial means needed to insurance businesses up to 7,5 billion dollars are ensured from the budget (§ 231 and 233 , the text of the Act is published by *Lowenfeld*, Tome II. pp. 414 and foll.). The Foreign Credit Insurance Association (FCIA) realizes the activity of the ExIm (Export-Import Bank) – also a state institute regarding the field of export credit insurance, "against inability to convert local currency" (*Glick – Duff*, page 290). Though FCIA is a partnership of private insurance companies undertaking a part political risks, the other risks, however, are covered by the reinsurances of ExIm, as "FCIA acts as Eximbank's agent for the political risk insurance" (ib. id. page 290).

Similar features can be claimed about the French COFACE, the British ECGD which was established in its present form by the Export Guarantees and Overseas Investment Act, 1978. HERMES Kreditversicherungs-AG is "a private insurance company with the commission of the federal government to provide insurance cover for German export transactions, in the name of the federal government (*Dunas*, page 300).

b) The state entered the insurance branch because of the fact that by the insurance mechanism of private capital, by the private insurance

companies striving after possible big profit the prompting effect (safe and overall guarantee) of insurance could not be reached. The main differences in brief are:

aa) It can be seen that behind the state insurance there is a large, absolute covering sum, e. g. at the OPIC to cover transactions of 7,5 billion dollars! Also ExIm supported transactions up to 10 billion value in 1978 (*Glick – Duff*, page 290) and behind this there exists the ExIm assets of 40 billion (ib. page 289). Even hitherto it runs to billions the insurance money paid by ExIm via OPIC or FCIA, to the victims of political risks.

Such absolute figures generally do not exist behind the private insurance companies severally. Though they balance this partly by reinsurances, nevertheless, to fortify reinsurance and capital (insurance) capacity by other means (partnerships, poolings, etc.) is also the task of state insurance companies (see e. g. Para. 7. f. of § 234. of the OPIC act, *Lowerfeld*, Tome II. page 421), consequently, their capacity to undertake risks is still stronger.

bb) It is clear also from what was said afore – only for sake of completeness of discussion – that the financial basis of the state insurers is partly the budget background (and naturally their own income).

cc) The time coverage is considerably longer as those of the private insurers and – what is important – the state insurance has a broader (not so restricted) risk undertaking profile, still acting with far lower insurance premia. As we have already seen, the premium moves generally around 1%, while with private insurers this makes about 3 – 4%! (*Hunt*, page 231).

dd) However, for the state insurers there exists the restriction according to which they may grant their insurance service only to the export transactions of the given state's (e. g. the USA or France) companies (*Hunt*, page 226).

ee) It is an important feature beyond the "generosity" of the insurance conditions – their "fairly broad reach" in the interpretation practice (*Hunt*, page 229). "In carriyng out its purpose, the corporation shall use *broad* criteria", says also the Preamble of the OPIC-Act (see *Lowenfeld*, II. page 414).

c) Over and above what was said, the economic- and legal policy essence is expressed mainly in the following.

aa) The export credit insurance expresses an important factor of the state export-supporting mechanism of the given capitalist countries (known to all that the second important factor is the state export-credit system itself, partly via the same state banking institutions like ExIm, ECGD). The statutes of the ECGD, the already mentioned § 2. of the 1978 Act is explicitly in the spirit of "the national interest" and regulates in this spirit the function of the ECGD (*Dunas*, page 299). The corresponding American Act, under the title of "Purpose and Policy" claims: "To mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed frienfdly countries and

areas, thereby complementing the development assistance objectives of the United States" (text of the Act at *Lowenfeld*, II. page 414).

Hunt rightfully says in general (page 229) that the state insurance mechanisms covering the export of goods and services against political risks "are simply integrated part" of the state foreign economic policy, the support of the compaines' export transactions.

bb) Beside the own economic interests there is expressed – especially in the said formulation – that the outlined system of the export credit-insurance is at the same time a means of supporting the trade of the developing countries. Viz. it ensures that the relations of private companies shall be profitable also if political risks, e.g. the various moratoria would aggravate or make them even impossible.

In the OPIC-preamble we have already seen all this having been emphasized (aa). The same can be read in the statutes of the corresponding GFR and Dutch institutes (*Hunt*, page 226). The ECGD-principle – "rendering assistance to countries outside the UK" – has also been reported (in particular at *Schmitthoff*, pp. 222 and foll.).

cc) An important circumstance is also to safeguard the international competitive position of the own companies, i.e. to increase the national export ability. And the competition runs also for the market of the developing countries. If a company can stay on the market also in times of moratoria, because of having in the background a good political risk insurance, this company has and will have later on a fix advantage against those who are compelled to withdraw from the market, in lack of a suitable background insurance. This can be well seen especially at the export-credits themselves i.e. at their interests. It is well-known, how much these credits are conditions of competitiveness. So much that the cut-throat competition of interest rates and time coverage between countries made even the capitalist countries fed up and finally they reached a consensus in the OECD in respect of the generally followed credit-policy principles ("the he Consensus rules have largely been observed", *Dunas*, page 30).

V. Interpretation of the moratorium under its vital conditions of today and the more general notional function of export credit insurance

26. The point is to interprete moratorium according to the above title, on basis of what was said afore about such interpretation (3, b, aa, vii). We have to start partly from the normative appearance of the given categories, i.e. rules, partly from the social functions of the categories (legal concepts) in question, i.e. from the purposes which are to be reached or promoted by the ruling.

Accordingly, the question is whether moratorium shall be interpreted strictly or boader in this sense: shall we treat as moratorium only the one declared – ordained by a provision of law, or shall we qualify as transfer-moratorium also those moratorium-phenomena, which on basis of the comparative law analysis of literature and practice were marked disguised or

covered moratoria, i.e. transfer inablility as depicted above (see 17–18, 23.a).

We have already touched upon that the denomination "moratorium" is not clear-cut in case of a legal dispute arising from the Hungarian insurance conditions, i.e. that Hungarian law of today does not regulate this institution (3. b, aa/i-v.). This can be taken as a fact. It can be taken as another fact, – if the itemization of the norm-structure of moratorium as a law concept is concerned – that in other Hungarian higher ranking legal rules this category is not mentioned either, nor is the export credit – insurance, so much so that the outlined conditions of export credit insurance (3, b, aa, ii–iii) make no mention even of the insurance rules of the Civil Code (as legal hinterland). They do so with some reason, since this kind of insurance does not appear in the Civil Code or in decrees superior to the "Announcements" or "Notices", but it would be really difficult to adapt it to the general insurance or property insurance rules of the Civil Code.

Thus it remains to us to interprete the moratorium as a loss event of export credit insurance according to its economic- and legal policy function, in other words: in its functional definition.

27. The following circumstances speak for the broader interpretation.

a) To begin from far, the text book-like thesis claims that also in socialist economy and law the insurance has the function of sharing or distributing the loss, viz. of protecting the individuals and to ensure the financial conditions of existence and continuity.

b) This insurance function is performed by the State Insurance Company. "Taks of the State Insurance Company are all insurance and reinsurance operations, as well as fulfilment of insurance dealings and other tasks entrusted to the Company by the minister of finance" (Oder No. 18/1972. MT. on the insurance activity, § 3).

On basis of the above, in the referred to "Announcements" the ministry of finances has made the task of the State Insurance Company also the export credit insurance against political risk. Similarly the outlined conditions were determined by the ministry of finances (Decree No. 24/1972. PM. on the state Insurance Company, § 2); finally, to credit insurances the State Insurance Company has to establish also reserve funds (in. id. § 4).

c) In Hungary the State Insurance Company has explicitly the monopoly of insurance by the above provisions of law. This means that the insurees have no choice between the State Insurance Company and an other insurance company perhaps granting better conditions. (Even if we presume the possibility of an insurance effected abroad, it must be remembered that the insurers of the said Western countries may generally effect an insurance contract but with the companies fo their own countries). Also hereof it follows that the State Insurance Company has to provide the possible maximum of the economic function of insurance, in accordance with the interests of the Hungarian national economy. This is to be done by relying on reasonable insurance premia, partly by that internal economic system which is optimally possible between the State Insurance Company and its owner. In respect of the possible maximum the decisive momentum

should be the general relation which exists or should exist between the state and the export activity supported also by the insurance. This speaks for the more complete and guaranteed insurance.

d) In its foreign economic activity the Hungarian state – due to its export-orientatedness – is interested in and endeavours to expand our foreign market chances, to assist and increase the competitive position of our companies. The institution of export credit insurance itself derives herefrom. Acutally also from the fact that the economic administration notices the moratorium-phenomena in foreign markets and that the foreign state measures relating to them cannot be disputed from legal point. On the other side, the economic administration wants that the company transaction shall continue, also on these foreign markets despite the moratorium-phenomena. Furthermore that Hungary is interested in the development of the economy of developing countries, also in compliance with its economic policy, this is legally expressed in many of our bilateral treaties.

e) If the actual export credit itself (e.g. firm credits and other credit forms) and the insurance are not extended by the same financial institution or it has no separate institution as in some industrialized countries, the two activities are still to be regarded in their unity, they equally serve the competitiveness of our companies, by state bank subsidies. This is so considered by foreigns trade practice (and so this apperars in the practical hand book bearing the title "Technique and organization of foreign trade", see *Hegyi – Törzsök – Gulyás*, pp. 108 and foll.) As a consequence, the insurance against political risks is a part of export assistance also in Hungary. This – contradictory to the restricting tenor and interpretation of the concrete insurance contracts – calls for completeness in accordance with the goal of the assistance.

f) After all, the export credit-insurance affects mainly the inland manufacturing-seller companies, and so the losses of many millions arising from the risk. This is a heavy burden and will but increase, if the insurance does not comprise the covered moratorium depicted above. It can but have a disadvantageous reaction on the affected economic organizations and in general to the national economy, as well. To leave this burden with the said companies is very disputable the more so because they have a small experience on the mode of moratorium practice in different countries less known by them. The manufacturing company cannot estimate in advance the eventuality, whether his political risk will present itself as legally declared or just practiced. Against such contingencies the insurance companies are qualified and able to defend themselves, due to their general function. The broader form of the insurance defence is the more justified, the more the states practice the form of the covered moratorium. Otherwise the insurance protection would mainly appear (in case of moratoria declared by law) where are almost no or few loss events and it would be missing where the insurance safeguard is really needed. This would take place beside insurance contracts which made the inland manufacturer (and the foreign trade company) believe that they were protected against moratorium. In extreme cases this can be taken as a situation where the expec-

tations contained by Civil Code § 4, Para. 1–2, § 205, Para. 3 and § 209 would not be completely attained.

g) Since generally a transitional bearing of burdens is concerned – for the time until the moratorium lasts – and naturally the insurer assumes the rights of insuree (Civil Code § 558), so that later on he generally obtains the insured money (in the form of the purchase price transferred posteriorly), the question really is, where the bearing of burdens shall be domiciled the most reasonably during this transitional period. The acceptance of responsibility of the insurer seems to be justified also in this connection, because of the following reasons: the insuree wanted to protect himself exactly against the indicated risks (the transitional payment delay); a lesser insurer's burden than general is concerned (as the insurance not lost forever); on principle the insurer possesses a pooled amount of money serving all his insurees; thus, theoretically the assumption of risk would not jeopardize the continuity of the insurer's business activity, while this might be the case with the insuree.

28. The following circumstances speak for the stricter interpretation.

a) The hypothetic assumption that the function of the insurance company is definitely efficiency (profit) orientated. However, in this insurance branch and against the above arguments the overemphasising of this function cannot be maintained (we have already seen that in the insurance system of the Western countries the profit-orientatedness is not decisive either in this domain.)

b) To such a hypothetic position (commercial type of insurance conception) there could better be connected the view maintained by more authors (especialy earlier) that the entire moratorium-law ought to be taken as a strictly interpreted exception to the general rules of the contract-law and that is why the concrete insurance conditions can be interpreted but in strict sense, the more as the contracts are concluded from fully equal legal position and autonomy. The restrictive interpretation is however – opposite to the decisive functional interpretation – only formal and secondary in the Hungarian law, and the hypothetic position is hard to suppose either.

c) Against the arguments for broad interpretation the main reason might be that in the given economic mechanism of the State Insurance Company – determined by the state (the ministry of finances) and included the possibilities and limits of the reinsurance and the domestic insurance premiums – the said Company could not undertake financially the entirety of the risks in question and in the unity of foreign economic policy and insurance policy this would not be desirable with *ex tunc*, nor perhaps with *ex nunc* effect either.

d) Against the broader or functional legal interpretation, the latter counter-arguments could, however, be held only if the evidences detailed in 27 were not existing, their justness disputable, or if they were *mutatis mutandis* acceptable and to be read with opposite sign. This however, is hard to say.

Still, supposing the acceptation of the stricter interpretation, two consequences are to be drawn, One is: the contract conditions (and legal rules) interpreted thusly in strict sense are to be made more exact and the restrictions unambiguous. The other: on the basis of wath was been said afore, *de lege lata* steps are to be taken.

VI. Final conclusions

If we wish now to summarize the essence of our analyses and examinations, the following can be said:

29. Moratorium is a well-known institution in law — today more expounded in the law and practice of the industrialized countries. It is a complex phenomenon and can equally been found in the sources of municipal administrative law, international public law, civil law and in the law of international economic relations. Also when realizing itself, it appears generally in its complexity.

30. In international economic relations the transfer-moratorium takes the first place. Here too as a part of the export credit insurance, as a category of an insurance event originating from political risks. Consequently, first of all in the legal relations of insureres and insurees expressed generally (by rules) or actually by particuar contracts. "First of all" is meant so that naturally the insurance company and the transfering bank (the debtor) will get also into legal relation if after the perfomance of the insurer the latter assumes the right of the former.

Also in the Hungarian practice of today the moratorium has became an important problem in the field of export credit insurance against political risks.

31. In the practice of export credit insurance the transfer moratorium can be interpreted in a narrow (restrictive) and in a broad (extending) sense. In the narrow sense the transfer-moratorium is the one which under economic distress will be declared or oradined by law in the country of the debtor. The other of broad sense comprises all compulsory payment delays of the debtor country or its bank, e.g. also the mere non-payment lasting for a fixed period.

In the Hungarian praxis the question is arising thereof that in the sphere of insurance against political risks the formulation of the moratorium as an insurance event is not clear-cut, either in the "Notices" in force, or in the concrete contract conditions of insurance of the State Insurance Company; they admit both, the restricted and the broad interpretation. To establish an unambiguous position is, thus, justified and necessary partly in view of jurisdiction, partly form the aspect or normative shaping of future practice.

32. Beyond the fact that moratorium is denominated as en insurance event by the export credit insurance conditions and the background "Notices" of the ministry of finance thus, beyond the use of this concept, the Hungarian law does not know this institution and does not regulate it in a normative way. Therefore to attain teh unambiguous position mentio-

ned earlier, the jurisprudential explanation, qualification and interpretation of the transfer-moratorium are to he applied. This is stated by the Hungarian private international law, if the content of a legal category unknown to Hungarian law is to be ascertained. This is claimed by the Hungarian normative dispositions relating to statutory interpretation, if the content of a notion cannot be found in the positive law. And this is taught also by legal theory.

33. Within the generalizing opinion of jurisprudence the conception of moratorium is known in its narrow and broad sense, as well. In connection with the export credit insurance newer opinions draw also the broadly interpreted moratorium (the transfer inability) under the concept of moratorium. However, also in general there pertains hereto the theoretical thesis according to which legal concepts in rational interpretation of jurisprudence are always generalizing, i.e. they comprise the partially different sub-variants too.

34. In the foreign practice "visited" by us via qualification there prevails generally the broader interpretation (the transfer inability), because of these reasons: the competitive position of foreign trade and of the domestic companies, as well as the assistance of the developing countries is at stake; the insurance praxis is therefore carried out by state insurance companies supported by state means; consequently an insuree-orientated practice is being followed compared to the profit-orientated conditions of the private insurers.

35. The interpretation of the institutions moratorium and export credit insurance according to the aims of Hungarian economic and legal policy depends on the interpretation of these aims. The alternatives of this latter interpretation were tried to be conceived above (27 and 28). To take side in paricular cases is, besides considering the enumerated and other arguments, the task of judicial fori, and to take the necessary steps *de lege ferenda* is, relaying on the said and other possible reasons, the privilege and obligation of the legislator.

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1. The sources of law and other normative instruments (e.g. the IMF Agreement, GATT, moratorium treaties, domestic rules of moratorium, decrees relating to export credit insurance and their practice, etc.) are figuring in the text.

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POLITISCHES RISIKO IM BEREICH DER AUSSENHANDELSVERTRÄGE

Moratorium als politisches Risiko und Export-Kredit-Versicherung

von

Prof. FERENC MÁDL

Der Aufsatz befasst sich mit den Fragen des politischen Risikos im Bereich der Aussenhandelsverträge. Eine Erscheinung des politischen Risikos ist das Transfermoratorium, wozu es in Ländern mit schweren Devisenproblemen kommen kann. Eine der möglichen Schutzmassnahmen ist der Versicherungsvertrag — eben gegen solchen Risiken. Die Frage ist aber — im wichtigen grossen Fällen, also de lege lata und auch de lege ferenda — was ist eigentlich juristisch gesehen ein Moratorium. Das wird im Aufsatz untersucht, und zwar mit Bezug auf die allgemeinen theoretischen Behauptungen, die ungarische Rechtsgeschichte, die aufländische Gesetzgebung und Praxis, so wie mit Bezug auf die Funktion der Export-Kredit-Versicherung in der heutigen ungarischen Aussenhandelspolitik.

ПОЛИТИЧЕСКИЕ РИСКИ В КРУГЕ ВНЕШНЕТОРГОВЫХ КОНТРАКТОВ

Мораторий как политический риск и его понимание
в страховании экспортного кредита

Проф. Ф. МАДЛ

Транофертный мораторий является одной из политических русков, что может случаться в странах борющихся с трудностими девизы. В круге возможных защит играет важную роль страхование экспортного кредита. Однако дело состоит в том-в делах большого значения, то есть де леге лата и де ференда.- чем является мораторий с юридической точки зрения, какие его узнаваемые абстрактные понятия, в чем заключается его юридическое содержание. Учение изучает этот вопрос с одной стороны анализем общих зрений юридической науки, с другой стороны прежней венгерской юридической практики, с третьего раза сегодняшнего заграничнего правосоздания и юридической практики, с четвёртого раза анализем той функции, которую страхование экспортного кредита призвано выполнять в сегодняшней внешнекоторговой политике Венгрии.